UPS Supply Chain Solutions, Inc. *and* Unión De Tronquistas De PR, Local 901, International Brotherhood of Teamsters. Cases 12–CA–159257 and 12–CA–168819

June 18, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On April 13, 2016, Administrative Law Judge Michael A. Rosas issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed exceptions with supporting argument.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

For the reasons explained below, we reverse the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by conditioning bargaining on the Union's acceptance of negotiation ground rules, including one that required proposals to be submitted in writing and in English. We also find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to submit counterproposals. Finally, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith, but we find that the unlawful conduct began in August 2015, not December 2015, as found by the judge.

I. FACTS

On July 29, 2014, the Board certified the Union as the exclusive collective-bargaining representative for approximately 15 employees who work at the Respondent's facility in Caguas, Puerto Rico. On December 16, 2014, the Union sent a letter to Ilka Ramón, the Respondent's Human Resources Director in Puerto Rico, requesting bargaining dates. On December 19, 2014, the Respondent's counsel, José Silva Cofresí, replied that the Respondent would propose bargaining dates once it received the Union's initial proposal. On February 18, 2015,[2] Argenis Carrillo, a union representative, submitted the Union's initial 67-page proposal in Spanish to the Respondent with a letter stating that he was available to bargain the following week. The parties met for an initial bargaining session on April 9,[3] where the Respondent presented the Union with proposed ground rules for negotiations that stated, in relevant part, "3. The proposals and counterproposals will be made in writing, in English." The proposed ground rules were in English, but all other communications between the parties—including all the parties' written correspondence, the Union's initial written proposal, the parties' March negotiations over layoffs, the bargaining session on April 9, and all subsequent bargaining sessions—were in Spanish.

Pursuant to its proposed ground rule 3, the Respondent asked the Union at the April 9 session to translate its initial proposal into English. The Union did not agree to the ground rule and rejected the Respondent's request. The parties discussed the Union's proposal but did not reach agreement on any of the provisions.

On July 15, the parties met for a second bargaining session. According to Union Representative Carrillo's uncontradicted testimony, the Union offered to submit any future counterproposals in English but again rejected the Respondent's request to translate its initial proposal.[4] The Respondent replied that it would pay half the cost, but the Union rejected this offer. At the July 15 meeting and again on July 24, the parties discussed, in Spanish, the Union's initial proposal but did not reach agreement on any provisions. Also on July 15, Carillo requested certain bargaining information that Silva Cofresí provided the next day. At the July 24 meeting, the Respondent made a number of nonsubstantive oral counterproposals; the record indicates these were limited almost exclusively to word choice and paragraph organization. In addition, the Respondent insisted that the Union pay half the cost of translating its initial proposal as a "condition for the negotiations to continue." The Union again refused.

On August 6, Carrillo requested dates for further bargaining. Silva Cofresí replied on August 7, stating that the Respondent required proposals in English because "these have to be verified by people in the U.S. who speak English [and]… as part of the negotiating team, people from the U.S. who only speak English may come down," and reiterated the Respondent's offer to pay half

[1] We shall modify the judge's recommended Order to conform to our findings and amended remedy, and we shall substitute a new notice to conform to the Order as modified.

[2] All subsequent dates are in 2015 unless otherwise noted.

[3] The parties met on March 26 and bargained over the effects of layoffs resulting from the Respondent's loss of a client, but they did not negotiate over the initial contract at that time.

[4] The judge's finding that it is "not disputed…[that] the Union was aware of the fact that the Company and two other Teamsters-affiliated locals in Puerto Rico exchange written CBA proposals and counterproposals in English" is not supported by the record. According to Carrillo's testimony, he knew only that the other locals' final agreements were in English and that the parties split the cost of translation for those final agreements.

the cost. On September 2, the Union filed an unfair labor practice charge alleging that the Respondent failed to bargain in good faith by conditioning continued bargaining on the Union's translating its initial proposal into English. There was no further communication between the parties until November 19, when Silva Cofresí sent a letter to Carrillo about resuming negotiations. Carrillo replied November 20, asking whether the Respondent's offer meant it had abandoned its demand that the Union translate its original proposal and explaining that the only reason the Union had stopped bargaining was the Respondent's insistence on that demand.[5]

On December 8, with the issue of translation still unresolved, Carrillo wrote to Silva Cofresí to request bargaining dates. Silva Cofresí told Carrillo that the Respondent would not be able to meet during December because it was the Respondent's "high season," and that he would get back to Carrillo once it was over. Not having heard from the Respondent, Carrillo called Silva Cofresí 3 to 4 weeks later to schedule bargaining sessions. Silva Cofresí said he could not commit to any dates because Human Resources Director Ramón was on vacation, but that he would agree to dates once she was back.

On January 27,[6] Carrillo wrote to Silva Cofresí to inquire again about bargaining sessions and to ask that the Respondent not condition bargaining on translation of the Union's initial proposal. Silva Cofresí replied that he thought they had agreed to wait for a decision on the Board charge before continuing negotiations, but the Union had not agreed to do so.[7] On February 5, Silva Cofresí wrote to Carrillo and offered to resume negotiations on February 24, but reiterated the Respondent's demand that the Union pay half the cost of translating the initial proposal. On February 8, Carrillo accepted the proposed date, rejected the Respondent's demand to pay for translating the initial proposal, repeated his offer to exchange any further proposals in English, and offered to pay half the cost of translating a final agreement.[8]

On February 23, Silva Cofresí texted Carrillo that the February 24 meeting was off because Carrillo had not previously confirmed his availability, so Ramón was not available to attend. Carrillo replied that he had confirmed by email on February 8. On February 24, Silva Cofresí emailed Carrillo to tell him that the Respondent would next be available for bargaining March 22 or 23. No further bargaining sessions were scheduled.

II. JUDGE'S DECISION

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act as of December 10, 2015, by delaying further bargaining. The judge did not expressly rule on the complaint allegation that the Respondent also violated the Act by failing to submit counterproposals. Finally, he dismissed the allegation that the Respondent violated the Act by conditioning negotiations on a permissive subject of bargaining. Specifically, the judge, relying on *Call, Burnup, and Sims, Inc.*,[9] found that translation of the Union's initial proposal was a mandatory subject of bargaining. He further found that the Respondent engaged in good-faith bargaining by offering to pay half the cost of translating the initial proposal. Accordingly, the judge found that the Union's refusal to agree to the Respondent's "reasonable accommodation" of splitting the translation cost for the initial proposal relieved the Respondent of responsibility for any delay in bargaining until December 10, 2015, when it began to engage in dilatory tactics.

III. ANALYSIS

A. Conditioning Bargaining on Acceptance of Negotiation Ground Rules

As a general proposition, it is a per se violation of Section 8(a)(5) and (1) for either party to hold collective bargaining hostage to unilaterally imposed preconditions on negotiations. *Regency House of Wallingford, Inc*., 356 NLRB 563, 576–577 (2011). See also *Vanguard Fire & Supply Co., Inc.*, 345 NLRB 1016, 1043 (2005) ("Neither an employer nor a union can wiggle out of this duty [to bargain] by insisting on preconditions"), enfd. 468 F.3d 952 (6th Cir. 2006).

In dismissing the allegation that the Respondent unlawfully insisted on translation of the Union's initial proposal, the judge relied on *Call, Burnup, and Sims,* supra, 159 NLRB at 1661–1662, in which the Board found that an employer violated Section 8(a)(5) and (1) by bargaining in bad faith. The Board relied on the employer's "overall course of conduct," which included insisting that the parties negotiate only in English, despite the Union's offer to split the cost of a translator where translation was necessary for bargaining. But that case does not support the judge's dismissal of the allegation here that it was unlawful for the Respondent to insist that the Union

[5] The record does not support the judge's description of Carrillo's response as stating that the "only reason why the negotiations had been delayed" was because of "the Board charges filed by the Company." The Respondent did not file any Board charges and the Union made clear that it had stopped bargaining because the Respondent insisted on the translation.

[6] All subsequent dates are in 2016 unless otherwise noted.

[7] The judge credited Carrillo's undisputed testimony on this point.

[8] Contrary to the judge's finding, this was not the first time the Union offered to submit counterproposals in English, as the record shows that Carrillo first proposed this during the July 15, 2015 bargaining session.

[9] 159 NLRB 1661 (1966), enfd. 393 F.2d 412 (1st Cir. 1968).

translate its initial contract proposal, for the following reasons.

First, the record in this case does not show that translation was necessary for bargaining to continue between the Respondent and the Union. If anything, the record establishes the opposite because the parties at the bargaining table communicated almost exclusively in Spanish: the Respondent's December 19, 2014 request that the Union submit an initial contract proposal was in Spanish; in March 2015, the parties bargained over the effects of layoffs in Spanish, and they discussed the Union's initial Spanish-language contract proposal in Spanish. Nonetheless, on April 9, 2015, the Respondent proposed a ground rule requiring that all proposals and counterproposals be in English. On July 15, the Union agreed to submit all subsequent proposals in English, but on that date and the following session on July 24, the Respondent conditioned future bargaining on translation of the Union's initial Spanish-language proposal.

Second, contrary to the judge's finding here, the Board in *Call, Burnup, and Sims* did not find that translation was a mandatory subject of bargaining. Id. In fact, because negotiation ground rules do not relate to wages, hours or other terms and conditions of employment, they are not a mandatory subject of bargaining. *Sheet Metal Workers' Int'l Ass'n*, 319 NLRB 668, 670 (1995). The judge's finding that the Respondent's translation request was a mandatory subject of bargaining cannot be reconciled with this well-established Board precedent, and we do not adopt that finding.[10]

For all of the above reasons, we find that the Respondent violated Section 8(a)(5) and (1) by insisting that the Union translate its initial bargaining proposal into English.

B. Failing to Submit a Counterproposal

It is undisputed that the Respondent did not submit substantive counterproposals, written or oral, throughout the three bargaining sessions on April 9, July 15, and July 24, even after the Union requested a written counterproposal at this last session.[11] The complaint alleged the failure to make counterproposals as a separate violation, and the judge cited precedent holding that the failure to submit counterproposals violates the obligation to bargain in good faith. See, e.g., *National Management Consultants, Inc.,* 313 NLRB 405 (1993) (employer's failure to submit any counterproposals tended to frustrate further bargaining and thus constituted a clear rejection of its collective-bargaining duty); *Chalk Metal Co.*, 197 NLRB 1133, 1147 (1972) (same); *Raynal Plymouth Co*., 175 NLRB 527, 530–531 (1969) (employer had union's proposals for several months, but presented no counterproposals and insisted on mere correction of typographical errors in the union's proposals). However, the judge failed to make a finding regarding whether the Respondent's conduct here was unlawful on that ground. We find that it was.[12] The Respondent violated Section 8(a)(5) and (1) of the Act when it failed on and after April 9 to submit a counterproposal to the Union's February 18 contract proposal.

C. Delaying Bargaining by Refusing to Schedule and Canceling Bargaining Sessions

We adopt the judge's finding that the Respondent delayed bargaining in bad faith for the reasons stated in the decision, but we disagree with the judge that "[t]he Union's bargaining posture prior to December 2015 relieved the Company [of] culpability under the Act." As discussed above, the Respondent could not lawfully condition bargaining on the Union's acceptance of a negotiation ground rule that the Union translate its initial pro-

[10] Member Kaplan believes that the language of bargaining proposals, even if a permissive bargaining subject, could be inextricably intertwined with mandatory subjects of bargaining if a party submitted a proposal in a language that negotiators *at the table* for the other party could not understand and therefore could not meaningfully evaluate and respond to the proposals on mandatory subjects. That was clearly not the situation in the present case. In fact, as stated above, the parties orally discussed several provisions of the Union's proposal at the April 9, July 15 and July 24 bargaining sessions.

Member Kaplan further notes, as stated above, that Silva's August 7 letter represents the only evidence of the Respondent's explanation of its need for an English translation of the Union's first contract proposal. That letter states in effect that the English version was needed by unidentified persons in the United States to review the contract proposal and by unidentified persons who might join negotiations in the future. This purported justification was too little and too late, coming over 3 months after the first bargaining session. It is true that at the commencement of contract negotiations, an employer may reserve the right for managers not directly involved in face-to-face negotiations to review and approve a final agreement--and a separate ground rule submitted at the first bargaining session on April 9 appeared to do this—but the employer's negotiators must have sufficient authority to bargain independently in order to comply with Sec. 8(d)'s good faith requirement. In a situation such as this, where all current negotiators were fluent in Spanish, the possibility that other negotiators who only spoke English might join the negotiations is too speculative to justify insistence on translation of the Union's first contract proposal. Further, if the Respondent's negotiators had engaged in good faith bargaining about substantive matters, the Union had agreed on July 15 to the exchange of all subsequent written proposals and counter-proposals in English. There is no apparent reason why the final agreement resulting from this process would not have been in English and understandable to company officials in the United States who would review that final contract for approval.

[11] As noted above, the Respondent made some minor, oral modifications but did not indicate any intention to present any substantive proposals to the Union.

[12] Insistence on a permissive bargaining subject, such as the Respondent's translation ground rule, clearly does not excuse the failure to make counterproposals.

posal. Accordingly, we find that the Respondent unlawfully delayed bargaining as of August 6, 2015, when the Union requested further negotiations and the Respondent refused unless the Union agreed to pay half the cost of translating its initial proposal.

AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusion of Law 5 and substitute the following:

"5. The Respondent has violated Section 8(a)(5) and (1) of the Act since July 15, 2015, by conditioning further bargaining on the Union's agreement to translate its initial contract proposal from Spanish to English, notwithstanding that the Respondent's representatives who are negotiating directly with the Union are fluent in Spanish.

6. The Respondent has violated Section 8(a)(5) and (1) of the Act since April 9, 2015, by failing to submit counterproposals for an initial collective-bargaining agreement.

7. The Respondent has violated Section 8(a)(5) and (1) of the Act since August 6, 2015, by refusing to bargain collectively and in good faith with the Union concerning wages, hours, and other terms and conditions of employment, including, after December 10, 2015, by failing and refusing to schedule bargaining sessions until February 24, 2016, by cancelling on one day's notice the bargaining session scheduled for February 24, 2016, and by not agreeing to schedule another session until March 22 or 23, 2016."

AMENDED REMEDY

Having found the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist from engaging in such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we order the Respondent to meet and bargain in good faith with the Union, without insisting on bargaining conditions, including its demand that the Union submit proposals in English or pay part of the cost to translating them, and, if a collective-bargaining agreement is reached, to reduce the same to writing and execute the agreement.

The General Counsel excepts to the judge's failure to impose a bargaining schedule, as sought in the complaint, asserting that it is necessary to fully remedy the Respondent's unfair labor practices. We agree. As discussed above, the Respondent unlawfully conditioned bargaining on the Union accepting negotiation ground rules, refused to submit substantive counterproposals, and delayed and cancelled bargaining sessions. Where, as here, the Respondent has employed dilatory tactics in contravention of its duty to bargain in good faith, we believe that a bargaining schedule requiring the Respondent to meet and bargain with the Union on a regular and timely basis is appropriate and would best effectuate the purposes of the Act. See *Professional Transportation, Inc.*, 362 NLRB No. 60, slip op. at 3 (2015): *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2 (2011) (ordering employer to comply with a bargaining schedule to remedy its unlawful conduct), enfd. 540 Fed.Appx. 484 (6th Cir. 2013). The General Counsel proposes that, upon the Union's request, bargaining sessions should be held for a minimum of 24 hours per month, for at least 6 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees. We find that this proposed schedule, which will promote regular meaningful bargaining between the parties, to be appropriate here. We shall also require the Respondent to submit written bargaining progress reports every 30 days to the compliance officer for Region 12, and to serve copies on the Union. See id.

For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we also find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's failure to bargain with the Union. The Board has consistently held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra at 738, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: '(1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act."'

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent, which unlawfully conditioned bargaining on the Union's acceptance of negotiation ground rules, including a demand that proposals and counterproposals be submitted in English, and engaged in a pattern of dilatory tactics during the certification year. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. To the extent such opposition exists, moreover, it may be at least in part the product of the Respondent's unfair labor practices.[13]

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's dilatory and other bad faith bargaining tactics to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order alone would be inadequate to remedy the Respondent's refusal to bargain with the Union in these circumstances, because it would permit a challenge to the Union's majority status before the taint of the Respondent's unlawful dilatory tactics has dissipated, and before the employees have had a reasonable time to regroup and bargain through their representative in an effort to reach an initial collective-bargaining agreement. Such a result would be particularly unjust in circumstances such as those here, where the Respondent's initial delay occurred during the certification year and its refusal to bargain would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of any employees who may oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.[14]

In addition, the General Counsel requests that the Notice be posted in both Spanish and English, and we grant this request.[15]

ORDER

The Respondent, UPS Supply Chain Solutions, Inc., Caguas, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Insisting as a condition of bargaining with the Union, Unión de Tronquistas de PR, Local 901, International Brotherhood of Teamsters, for a collective-bargaining agreement that the Union agree to a negotiation ground rule that it translate its initial Spanish language bargaining proposals into English.

(b) Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit by failing and refusing to meet at reasonable times and failing and refusing to submit counterproposals.

[13] The Respondent does not dispute its obligation to recognize and bargain with the Union; it argues only that it complied with that obligation.

[14] In light of the affirmative bargaining order, we do not pass on the General Counsel's exception that the judge failed to extend the Union's certification year under *Mar-Jac Poultry*, 136 NLRB 785 (1962). The affirmative bargaining order requires the Respondent to bargain in good faith with the Union for at least 6 months before the Union's majority status can be challenged. *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002). By contrast, a *Mar-Jac* extension would only extend the certification year by approximately 4 months, because the Respondent first refused to bargain on April 9, 2015. *Mercy Inc. d/b/a American Medical Response*, 346 NLRB 1004, 1005 (2006) ("[T]he record must support the need for an extension and the appropriate length of the extension"). Therefore, we find it unnecessary to pass on the General Counsel's exception as it would not materially affect the remedy.

Member Kaplan does not agree with his colleagues that an affirmative bargaining order, which could preclude any challenge to the Union's representative status for up to a year from the date the parties begin good faith bargaining, is appropriate in this case. He would instead grant the General Counsel's request for an extension of the *Mar-Jac* certification year, which properly reflects the fact that no bargaining violations took place during the first 8-plus months of the certification year that began on July 29, 2014. As the Board has stated, a certification year extension "need not . . . be the product of a simple arithmetic calculation." *Colfor, Inc.*, 282 NLRB 1173, 1174 (1987). In this case, as in *Colfor*, a 6-month extension of the certification year bar would provide "a reasonable period of time in which the Union and the Respondent can resume negotiations and bargain for a contract without unduly saddling the employees with a bargaining representative that they may no longer wish to have represent them." Id. at 1175. This is particularly so in light of the mandated remedial bargaining schedule, which would assure at least twenty-four 6-hour bargaining sessions within the 6-month extension period.

[15] The General Counsel also requests that a management official read the notice to employees. We deny the request because the General Counsel has not shown that the other remedies provided here are insufficient to remedy the effects of the Respondent's unfair labor practices.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 15 days of the Union's request, bargain at reasonable times and places and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time and regular part-time warehouse employees who work at the Employer's facility in Caguas, Puerto Rico, excluding all other employees, guards, and supervisors as defined in the Act.

Upon the Union's request, such bargaining sessions shall held for a minimum of 24 hours of bargaining per month, with minimum negotiating sessions of 6 hours each, or, in the alternative, on another schedule to which the Union agrees. The Respondent shall also submit written monthly progress reports regarding the negotiations to the Regional Director and the Union no later than the last day of each month.

(b) Within 14 days after service by the Region, post at the Caguas facility in Caguas, Puerto Rico copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 12, in English and Spanish, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 9, 2015.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. June 18, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

Marvin Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT insist as a condition of bargaining with the Union, Unión De Tronquistas De PR, Local 901, International Brotherhood of Teamsters, for a collective-bargaining agreement that the Union translate its initial Spanish language bargaining proposals into English.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit by failing and refusing to meet at reasonable times and failing and refusing to submit counterproposals.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 15 days of the Union's request, bargain at reasonable times and places and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time and regular part-time warehouse employees who work at the Employer's facility in Caguas, Puerto Rico, excluding all other employees, guards, and supervisors as defined in the Act.

Upon the Union's request, such bargaining sessions shall be held for a minimum of 24 hours per month, for at least 6 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees.

WE WILL submit written monthly progress reports regarding the negotiations to the compliance officer for Region 12 and serve copies of those reports on the Union no later than the last day of each month.

UPS SUPPLY CHAIN SOLUTIONS, INC.

The Board's decision can be found at http://www.nlrb.gov/case/12-CA-159257 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, DC 20570, or by calling (202) 273-1940.

Carlos J. Saavedra-Gutierrez and *Vanessa Garcia, Esqs.,* for the General Counsel.

Alicia Figueroa Llinas and *Jose A. Silva-Cofresí, Esqs.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. These consolidated cases were tried in San Juan, Puerto Rico on March 8, 2016. The charges emanate from a disagreement during bargaining as to the right of a party to insist on the translation into English of a collective-bargaining proposal written in Spanish in the United States Commonwealth of Puerto Rico. The dispute illustrates the unique implications of interstate commerce in an American territory where its citizens communicate primarily in a language other than English.[1]

The consolidated complaints allege that UPS Supply Chain Solutions, Inc. (the Company, UPS or Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act[2] by: (1) unlawfully insisting since July 15, 2015,[3] as a condition of reaching an initial collective-bargaining agreement (CBA) with the Union De Tronquistas De PR, Local 901, International Brotherhood of Teamsters (the Union), "that the Union submit all of its collective-bargaining proposals in English, notwithstanding that Respondent's representatives who are dealing directly with the Union are fluent in Spanish and the employees in the Unit speak Spanish;" (2) as a result of such a condition, which is not a mandatory subject of bargaining, the Company, since March 2, 2015, "has failed and refused to make a counterproposal to the Union's Spanish language proposal for an initial collective-bargaining agreement;" and (3) failing and refusing, since August 6 to meet and collectively bargain with the Union for an initial CBA.

The Company denies the allegations that it has failed to bargain in good faith and asserts the amended complaint in Case 12–CA–168819 is partially time-barred because it was not filed until more than 6 months later, on February 19, 2016.

Procedurally, the Union filed a charge in Case 12–CA–159257 on September 2. That charge alleged that, since "about June 2015," UPS has bargained in bad faith with the Union by conditioning continued negotiations for an initial CBA on the Union's translation of its proposal from Spanish into English. The initial complaint in 12–CA–159257 issued on December 30. On February 19, 2016, the General Counsel amended the complaint to change the accrual date from June 2015 to "on or about July 15, 2015."

On February 1, 2016, the Union filed a charge in 12–CA–168819 alleging that the Company failed to bargain in good faith since January 2016, by refusing to meet and bargain because of the charges pending before the Board. On February 19, the Union filed an amended charge in Case 12–CA–168819 alleging that, since August 1, the Company has been refusing to meet and bargain with the Union for the purpose of negotiating a first CBA. A complaint in Case 12–CA–168819 issued on February 23. On March 2, 2016, the Regional Director issued an order consolidating Cases 12–CA–159257 and 168819 for hearing.

On the entire record, including my observation of the demeanor of the sole witness, and after considering the briefs filed by the General Counsel and the Company, I make the following

[1] The laws of the Commonwealth of Puerto Rico declare Spanish and English as the "official languages of the Government of Puerto Rico." See, 1 L.P.R.A. § 59. It is also decreed that "[w]hen necessary, written translations and oral interpretations shall be made from one language to the other so that the interested parties can understand any proceeding or communication in said languages." 1 L.P.R.A. § 59(a)

[2] 29 USC §§151–169.

[3] All dates are 2015 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Company, a Delaware corporation with its principal place of business in Atlanta, Georgia, is engaged in the business of delivering parcels and providing specialized transportation and logistics services worldwide, including from a place of business in Caguas, Puerto Rico, where it annually derives gross revenues in excess of $50,000 from the transportation of freight in interstate commerce and purchases and receives goods valued in excess of $50,000 directly from points outside the Commonwealth of Puerto Rico. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

Ilka Ramon (Ramon) is the Company's Human Resources Director for its operations in Puerto Rico. José Silva Cofresí, Esq., serves as the Company's labor counsel in Puerto Rico.[4] In its daily operations within Puerto Rico, the Company's supervisors, managers and employees typically communicate with each other in Spanish, the language primarily spoken in the Commonwealth.[5]

On July 29, 2014, the National Labor Relations Board (the Board) certified the Union as the exclusive collective-bargaining representative of approximately 15 company employees. That unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act (the Unit) and is defined as follows:

> All regular full-time and regular part-time warehouse employees who work at the Employer's facility in Caguas, Puerto Rico, excluding all other employees, guards, and supervisors as defined in the Act.

Since certification, the parties have not signed an initial CBA. Lucas Alturet and Argenis Carillo have served as the Union's representatives during collective bargaining. The Company has collective-bargaining agreements with two other units in Puerto Rico, both of which are also local affiliates of the International Brotherhood of Teamsters. While those locals are operated independently of the unit of employees based in Caguas, Carillo is familiar with their collective-bargaining agreements. He is also aware that the Company and the other two Teamsters locals divide the cost of translating their CBAs into English.[6]

B. Bargaining

In a letter, dated December 16, 2014, Alturet requested that Ramon provide dates for collective bargaining. He also mentioned that the Union's written proposal would be forthcoming. Three days later, Silva Cofresí, acknowledged the request and advised that as soon as he received and reviewed the Union's written proposals he would "be in the position to propose dates for bargaining.[7]

On February 18, Carillo provided Ramon with the Union's 67-page proposal for a CBA, typewritten in Spanish, and stated his availability for bargaining during the following week at a time and place of the Company's choosing.[8]

On March 25, prior to a first bargaining session, Silva Cofresí informed Carillo that "[d]ue to the loss of an important client," the Company intended to lay off employees. He offered to meet with Carillo and bargain over the layoffs and the effects on unit employees. Carillo agreed and the parties met and bargained over the issue on March 26 at the Union's office. During that meeting, the parties reached an agreement over the issue of layoffs. The discussions were conducted in Spanish and there was no exchange of written proposals.[9]

On April 9, the parties met for the initial bargaining session. During this and all subsequent bargaining sessions negotiations were conducted in Spanish. In addition, with the exception of ground rules proposed by the Company at this session, all written communications between the parties before and after this meeting were exchanged in Spanish. The proposed ground rules were signed by Ramon and left blank for Carrillo to sign. The document identified the members of the bargaining committees—Carillo, Janytza Jimenez and "any other union representative" for the Union; and Ramon, Silva Cofresí and "any other UPS representative" for the Company. It also stated, in pertinent part:

> 3. The proposals and counterproposals will be made in writing, in English, duly identified by date and the name of the proposing party. It may be done in handwriting.
>
> 6. The parties' Committees have legal authority to bargain and reach agreements. However, the agreements, upon finishing the negotiation, will be subject to ratification in the assembly in the case of the Union and UPS representatives, in the case of UPS.[10]

The parties discussed the proposed ground rules, but the Union did not agree to any of them, including the Company's insistence that the Union's initial CBA proposal be translated

[4] It is undisputed that Ramon was at all relevant times a supervisor within the meaning of Section 2(11) and agent within the meaning of Section 2(13) of the Act.

[5] U.S. Census Bureau data reveals that 94.9 percent of Puerto Rico's residents speak a language other than English at home, 79.4 percent speak English less than "very well," and 70.2 percent of households in Puerto Rico have no one in the household age 14 and over who speaks English only or speaks English "very well." See, United States' Census Bureau, 2014 American Community Survey for Puerto Rico. http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S0501&prodType=table.

[6] Carillo denied that there is any relationship between the unit and the other two Teamsters locals in Puerto Rico. However, he conceded that Ramon was the Company's primary connection to all three labor organizations. (Tr. 43–44, 67–68, 74–75.)

[7] Jt. Exh. 1–2.

[8] Jt. Exh. 3.

[9] Jt. Exh. 4.

[10] The proposal was entitled an "Agreement Regarding The Norms That Will Rule The Negotiations Of The Collective Bargaining Agreement Between The Union . . . And . . . UPS." (Jt. Exh. 5.)

into English. Nevertheless, the parties proceeded to discuss every one of the clauses in the Union's proposal. An agreement was not reached regarding any of the proposed CBA provisions and the parties agreed to meet again on July 15.[11]

The second bargaining meeting was held on July 15. Carillo and Silva Cofresí continued discussing the Company's proposed ground rules and reached agreement on some, but Carillo continued to resist the Company's proposal that the Union translate its initial CBA proposal. He suggested that if the Company wanted the Union's initial CBA proposal translated into English it should pay for the cost of doing that. In response, Silva Cofresí proposed that the Company and Union each pay 50 percent of the translation costs. Carillo rejected that proposal as well.

After concluding discussion of the Company's proposed ground rules, the parties moved to a discussion of contract language. They discussed several provisions of the Union's proposed CBA but failed to agree on any of them. The Company did not submit a counterproposal.

On the same day, Carrillo requested that Ramon provide the following information: (1) disciplinary regulation; (2) medical plan benefits book; (3) service procedure or any related document; and (4) a breakdown of employees with an hourly salary.[12] Silva Cofresí replied on July 20, providing Carrillo with an employee list, including classification and salary, and a summary plan description of the health plan. He also reported that the Company did not have a disciplinary regulation in effect.[13]

On July 24, the parties met for a third bargaining session. Carillo and Silva Cofresí discussed several provisions of the Union's proposed CBA, as evidenced by Carillo's notations on numerous pages throughout the draft. No agreement was reached regarding a CBA. Carillo also requested a written counterproposal from the Company, but received only oral counterproposals from Silva Cofresí. The parties continued to disagree on the Company's insistence that the Union translate its initial proposal into English. Silva Cofresí explained that the Company's insistence on an English language version of the Union's initial CBA proposal was based on a request by a company official based at its headquarters in Georgia and "they . . . maintained their insistence on splitting costs . . . as a condition for the negotiations to continue that this matter be resolved."[14]

On August 6, Carrillo wrote to Ramon and informed her that he had "not received any formal reply regarding the status of the [negotiations], nor have I received any dates in order to continue with negotiations." He warned that, unless Ramon replied with the "dates to negotiate, I will be filing in the pertinent forums, understanding that the employer's demand is still the original document (Union's proposal) being translated into English. I have reiterated our position on several occasions regarding this issue and I still have not received a written reply."[15] Carrillo's warning evoked a reply from Silva Cofresí the next day:

> Our client, [UPS] has referred your August 6, 2015 letter to us relating to the collective bargaining agreement negotiations between the Union and UPS. As you know, we have conducted three (3) collective bargaining negotiations, the first one being on April 9, 2015, the second one on July 15, 2015 and the third one on July 24, 2015. You also know that since the beginning, we asked that the Union's proposals be in English because these have to be in verified by people in the U.S. who only speak English. Also, as part of the negotiating team, people from the U.S. who only speak English may come down. It is for the above reasons that UPS has asked, since the beginning of negotiations, that both the proposals and counterproposals be made in the English language because of the above reasons. In fact, we went as far as to inform you that UPS was willing to pay 50% of the cost in translating your proposals into the English language. The Union simply refused. Finally, we invite you to continue with the negotiations as soon as possible.[16]

Rather than reply, the Union filed an unfair labor practice charge on August 17. That charge was subsequently withdrawn. On September 2, the Union filed the charge in Case 12–CA–159257 alleging that the Company had, since June, bargained in bad faith by conditioning continued bargaining on the Union's translation of its initial CBA proposal into English.

There were no further communications between the parties until November 19 when Silva Cofresí followed up his August 7 letter to Carrillo by reiterating the Company's interest in resuming negotiations and urging Carrillo to contact him to schedule bargaining dates.[17] On November 20, Carrillo rejected Silva Cofresí's overture, expressed surprise and confusion, and asked whether the Company was withdrawing its conditions on the exchange of proposals and its insistence that the Union translate its original proposal into English. He referred to the Board charges filed by the Company as the "only reason why the negotiation has been delayed."[18]

On December 8, Carrillo wrote to Silva Cofresí requesting dates for the resumption of bargaining.[19] Silva Cofresí responded in an email on December 10, asking Carillo to call him to schedule bargaining dates. During a telephone conversation that day, Silva Cofresí explained that he could not schedule bargaining during December because it was the Company's "high season." He informed Carillo that he would schedule

[11] Carillo initially testified that item 3 of the ground rules— requiring that proposals be written in English—was not discussed during the first meeting. On cross-examination, however, he conceded that "[i]n that . . . first meeting of April 9 . . . the Union was clear that it would not translate the first proposal." (Tr. 28, 49–50.)

[12] Jt. Exh. 6.

[13] The Union did not take issue with the adequacy of the Company's response. (Jt. Exh. 7.)

[14] Carillo testified that the English language demand was attributed to "a request received from the United States, somebody in the United States." Since the Commonwealth of Puerto Rico is a territory and a part of the United States, the likely inference is to an official at the Company's Atlanta, Georgia headquarters. (Tr. 31–33.)

[15] Jt. Exh. 8.

[16] Jt. Exh. 9.

[17] Jt. Exh. 10.

[18] Jt. Exh. 11.

[19] Jt. Exh. 12.

further bargaining dates once the Company got through high season.[20]

The scheduling of dates to resume bargaining, however, proved elusive. Carillo called Silva Cofresí around the end of December or beginning of January, but the latter explained that Ramon would be on vacation and he could agree to dates when she returned. On January 27,[21] Carrillo wrote to Silva Cofresí, referring to their last conversation in which the latter told Carillo he would provide dates upon Ramon's return from vacation, but Silva Cofresí told Carrillo that he did not have available dates and "would continue with the case pending before the NLRB." Carillo concluded with a request for bargaining dates so that negotiations could resume without being contingent upon the Union presenting its original proposal in English.[22]

Silva Cofresí replied the same day, acknowledging receipt of Carrillo's letter and suggesting there was a misunderstanding about further scheduling:

> It seems as though there was a misunderstanding between you and me, due to the fact that the last time we spoke, we agreed that we would wait on the result of the Board case and then continue negotiating. I will be contacting you soon.[23]

Silva Cofresí's reference in his letter to a "misunderstanding" about whether or not to delay negotiations while Board charges were pending was incorrect. Carrillo never agreed to freeze negotiations.[24]

On February 5, Silva Cofresí wrote to Carrillo, reiterating the Company's willingness to pay 50 percent of the costs to translate the Union's proposals into English and invited the Union to continue with the negotiations on February 24.[25] Carrillo responded on February 8, accepting the proposed bargaining date and provided an opening on the issue of translation:

> In relation to your offer concerning the translation, let me remind you of the following: the company has placed the negotiations contingent upon the Union's first offer being translated into English. *On this condition, I have stated that yours truly can continue exchanging proposals in English as well as the final result of the negotiations if an agreement is reached, and divide the translation cost in half.* However, your committee has insisted on placing my proposal completely contingent upon translating the first offer in order to manage your client. Given this scenario, my position has not changed because it is an illegal, burdensome imposition that lacks practical sense. I will continue addressing this condition at the pertinent forum. I believe that your letter is only intended to confuse the administrative agencies relating to the pending charges and not seek a solution to the negotiation in good faith. We will be there on the day that you offered to see how the conditions that were imposed by the company have changed and the negotiation development.[26] (emphasis supplied)

On February 23, Silva Cofresí sent a text message to Carrillo asking whether the latter "was coming to negotiate tomorrow." Carrillo promptly replied "yes." Later that afternoon, however, Silva Cofresí texted again to state that since Carrillo had not provided prior confirmation, Ramon "can't come. So we can't negotiate tomorrow. Call me to schedule other dates for negotiation." Carrillo replied that his "confirmation has been in writing for a while" and he would consider further legal action.[27]

Carrillo responded in an email a short while later. The email referred to an attached letter in which he confirmed the February 24 bargaining date. He also referred to a telephone conversation they had earlier that day confirming bargaining on February 24. On February 24, Silva Cofresí rejected Carrillo's assertion, insisting that Carrillo "didn't attach the letter that was supposedly sent to me." He offered to resume bargaining on March 22–23.[28]

Legal Analysis

i. the company's timeliness defense

Preliminarily, the Company contends that the amended complaint in Case 12–CA–168819, alleging that it has failed to bargain in good faith since August 1, 2015, is partially time-barred. The amended charge was indeed filed more than 6 months later, on February 19, 2016. The timing defect, however, is not fatal if the conduct alleged occurred within 6 months of a timely filed charge and is "closely related" to the allegations of the charge. *Fry's Food Stores,* 361 NLRB 1216, 1217 (2014), citing *Redd-I, Inc.,* 290 NLRB 1115 (1988).

The initial charge in Case 12–CA–168819, filed on February 1, 2016, falls 6 months and 1 day after the August 1, 2015 accrual date in the amended charge. However, the timely-filed complaint in Case 12–CA–159257 alleges that the Company has, since July 15, 2015, unlawfully insisted that the Union submit all proposals in English and since March 2, 2015, failed and refused to make a counterproposal to the Union's Spanish language proposal. That complaint contained more specific theories than the more general claims of failing or refusing to meet and bargain in Case 12–CA–168819. However, the evidence produced at trial revealed the common threads in both consolidated cases—the alleged bargaining delays attributable to the translation dispute that rolled over into February 2016; and the bargaining delays alleged since either August 1, 2015, or January 2016, are allegedly attributed at least in part to the translation dispute and failure to provide a counterproposal since March 2015. The Company's defenses are the same in both cases.

Under the circumstances, the Union's charge that the Company has, since August 1, 2015 failed and refused to bargain in good faith defect is deemed "closely related" to the timely filed charges and amended complaint in Case 12–CA–159257. See *Alt. Energy Applications, Inc.*, 361 NLRB 1203, 1203 (2014)

[20] Jt. Exh. 13.

[21] Dates hereinafter refer to 2016.

[22] Jt. Exh. 14.

[23] Jt. Exh. 15.

[24] This finding is based on Carillo's credible and undisputed testimony that he never agreed to delay negotiations. (Tr. 38.) It was consistent with his November 20 letter declaring his availability to continue bargaining while at the same time attributing the delay to the pendency of Board charges. (Jt. Exh. 12.)

[25] Jt. Exh. 16.

[26] Jt. Exh. 17.

[27] Jt. Exh. 18.

[28] Jt. Exh. 19–20.

(claims closely related where the events involved the same sections of the Act, arose from the same sequence of events, the events were part of the same chronology and involved the same people.). Accordingly, the Company's affirmative defense based on Section 10(b) of the Act is dismissed.

ii. the language issue as a subject of bargaining

The complaint alleges that since July 15, 2015, as a condition of reaching an initial collective-bargaining agreement, the Company has unlawfully insisted "that the Union submit all of its collective-bargaining proposals in English, notwithstanding that the Company representatives dealing directly with the Union, as well as the unit employees, are fluent in Spanish." It is further alleged that as a result of such a condition, which is not a mandatory subject of bargaining, the Company, since March 2, 2015, "has failed and refused to make a counterproposal to the Union's Spanish language proposal for an initial collective-bargaining agreement" in violation of Section 8(a)(5) and (1) of the Act. In addition, the complaint alleges that the Company has failed and refused, since August 6, 2015, to meet and collectively bargain with the Union for an initial CBA.

The Company denies the allegations and contends that the "parties have historically negotiated in the English language and exchanged all proposals and counterproposals in the English language." That defense lacks merit since the evidence reveals that the parties have always conducted bargaining sessions in Spanish. The Company also insists, however, that it has bargained in good faith with the Union by offering to pay half the costs of translating the Union's Spanish language proposals, informing the Union about and bargaining over planned layoffs, and providing information requested by the Union.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d) of the Act defines the duty to bargain collectively as "the . . . mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

Subjects deemed to relate to wages, hours and other terms and conditions of employment are considered mandatory subjects of bargaining. *NLRB v. Wooster Division of Borg-Warner,* 356 U.S. 342 (1958). When negotiating over a mandatory topic, a party cannot condition participation on either acceptance of its proposal or withdrawal of a demand by the other side. While a party can take a position that might ultimately result in a bona fide impasse, it cannot refuse to continue negotiations or discuss other issues. *Vanette Hosiery Mills,* 80 NLRB 1116 (1948) (employer unlawfully insisted on an agreement regarding wages as a precondition to bargaining over other subjects); *Heider Mfg. Co.*, 91 NLRB 1185, (1950) (employer's insistence on omitting from renewal contract benefits included in the most recent contract, including seniority, arbitration and grievance provisions, evidenced bad faith).

In contrast, parties are not required to bargain over nonmandatory, or permissive, subjects of bargaining. *NLRB v. Wooster Div. of Borg–Warner Corp.*, 356 U.S. at 348–349. Thus, a party violates section 8(a)(5) of the Act by insisting, even in good faith, on a nonmandatory subject as a precondition to reaching agreement on mandatory subjects. Id; *NLRB v. Pennsylvania Telephone Guild*, 799 F.2d 84, 87 (3d Cir.1986).

In this case, the parties actually met and bargained in Spanish over an initial collective-bargaining agreement, negotiations stalled when the Union proposed a CBA written in Spanish and the Company insisted that the Union provide it with a translated version of the proposal in English. The Union balked and the Company offered to share the cost of translation. The Union clung to its position, maintaining that, since the translation was requested for the Company's benefit, the Company should have to bear the full cost of that task. In essence, the General Counsel argues that the Company's demand for the Union to translate its initial CBA proposal entailed a preliminary issue constituting a permissive subject of bargaining.

The issue of whether to require the Union to translate its initial CBA proposal may seem like a procedural or logistical hurdle. The reality is, however, that certain logistics issues are "just as much part of the process of collective bargaining as the negotiations over wages, hours, etc.," and therefore mandatory subjects of bargaining. *Destileria Serralles, Inc.*, 289 NLRB 51, 58, fn. 17 (1988); *Gen. Elec. Co.*, 173 NLRB 253, 257 (1968).

Several facts are not disputed: (1) the Union's proposal for an initial CBA was written in Spanish; (2) the proposal contained provisions relating to unit employees' "wages, hours, and other terms and conditions of employment;" (3) there is/are company officials based in Georgia who, although not yet engaged in direct bargaining with the Union, are involved in the process through Silva Cofresí;[29] (4) one or more of those Company officials are not fluent in Spanish; (5) and the Union was aware of the fact that the Company and the two other Teamsters-affiliated locals in Puerto Rico exchange written CBA proposals and counterproposals in English.

Under the circumstances, it is evident that the Company's demand for translation of the Union's initial CBA proposal is one that affects the "terms and conditions of employment" embodied within the document. The connection is obvious—without a translation of the Union's CBA proposal, one or more of the Company's representatives are unable to determine what the proposed terms and conditions are. It logically follows that if one is unable to decipher a document's contents he/she cannot reasonably be expected to negotiate over it.

Although the Board has not addressed this very issue, its decision in *Call, Burnup, and Sims, Inc.*, 159 NLRB 1661 (1966), indicates that the ability of negotiators to communicate with and understand each other constitutes a mandatory subject of bargaining over which the parties have a duty to bargain in good faith. In that case, which also arose in Puerto Rico, the Board addressed a dispute regarding the language to be spoken during bargaining. The union provided an English translation of its initial Spanish language contract proposal and offered to pay half the cost of an interpreter during bargaining. However, the employer rejected the offer, refusing to bargain in Spanish or split the cost of an interpreter. Under the circumstances, the Board held that the employer breached its duty to bargain in

[29] Although not elaborated in the record, it is reasonably inferred that Silva Cofresí was referring to a company official(s) with some role in the CBA approval process.

good faith by refusing to reach an accommodation to resolve the language problem which was impeding negotiations. Id. at 1663.

As in *Call, Burnup, and Sims, Inc.* the issue here relates to the ability of a party's representative to actually *understand* the terms, conditions and other terms of employment proposed by the other side. In the absence of such an understanding, a party would be unable to engage in and conclude bargaining over those terms of employment. As such, the issue of translating a document for the benefit of a party unable to understand it in its Spanish language form is distinguishable from instances cited by the General Counsel as examples of bargaining over permissive subjects of bargaining. Those examples involve logistical approaches or other issues of relevance to the proposing party. However, if resisted or ignored by the other party, such issues would not impede the proposing party's ability to negotiate in good faith over proposals relating to established terms and conditions of employment. *Bartlett-Collins Co.*, 237 NLRB 770, 772–773 (1978) (whether to use court reporters during bargaining); *Timken Co.,* 301 NLRB 610, 614–615 (1991) (same); *Local 3, International Brotherhood Of Electrical Workers, AFL–CIO*, 280 NLRB 265, 266–267 (1986) (whether to tape record negotiations); *Smurfit-Stone Container,* 357 NLRB 1732, 1733–1734 (2011) (insistence on midterm cancellation of contract as a condition to bargaining the effects of a plant closure); *Salvation Army of Massachusetts,* 271 NLRB 195, 198–199 (1984) (insistence on acceptance of employer's religious mission as a condition for negotiations); *Vanguard Fire & Supply Co.,* 345 NLRB 1016, 1017–1018, 1042–1043 (2005) (insistence on submission of an outline of the agenda prior to bargaining).

Applying the good faith bargaining obligation articulated in *Call, Burnup, and Sims, Inc.*, the Company took a reasonable step towards an accommodation by offering to pay for half the cost of translating the Union's CBA proposal. Carillo was aware of the practice between the Company and the two other Teamster's affiliates in Puerto Rico to exchange contract proposals in English and split the cost of translation. The Union, however, remained steadfast in its refusal to entertain such a resolution enabling the Company to treat the translation issue as a mandatory subject of bargaining, although it did not ultimately insist to impasse. Under the circumstances, the Company's insistence that the Union submit all of its collective-bargaining proposals in English involved a mandatory subject of bargaining over which it attempted to bargain in good faith with the Union.

Accordingly, the claim in Case 12–CA–159257 regarding the Company's insistence on an English translation of the Union's CBA proposal as a condition to further bargaining is dismissed.

ii. the company's failure to make proposals and failure to meet and bargain

The consolidated complaints also allege that the Company failed to make written bargaining proposals since March 2, 2015, intentionally delayed negotiations, and failed to meet and bargain since August 1, 2015 due to a host of spurious delays and excuses.

The Board has long held that an employer's failure to submit a counterproposal to a union's proposal violates Section 8(a)(5). *National Management Consultants, Inc.,* 313 NLRB 405 (1993) (employer's failure to submit any counterproposals tended to frustrate further bargaining and may thus constitute a clear rejection of its collective-bargaining duty); *Chalk Metal Co.*, 197 NLRB 1133, 1147 (1972) (same). In this context, even cursory responses have been deemed insufficient. See *Pioneer Astro Metallics*, *Inc.,* 156 NLRB 468, 472–473 (1965) (brief 1 1/3 page "Company reply" partially responding to union's proposal, omitting any reference to wages, amounted to a "counterproposal only 'for the record' and not with any genuine intent to negotiate an agreement"). Similarly, an employer's ploy to refrain from submitting a counterproposal and instead continue discussion over the language of a union's proposal constitutes bad faith bargaining. *Raynal Plymouth Co*., 175 NLRB 527, 530–531 (1969) (employer had union's proposals for several months, but presented no counterproposals and insisted on mere correction of typographical errors in the union's proposals).

The evidence fails to support a finding of bad faith delay by the Company prior to December 2015. The Union was certified as the bargaining unit's labor representative on July 29, 2014. On December 16, 2014, the Union requested the Company bargain over an initial CBA. Several days later, Silva Cofresí, acknowledged the request, but requested a written proposal from the Union before scheduling bargaining. That was a reasonable request since the parties would waste their time at a first bargaining session without one. On February 18, 2015, Carillo provided Ramon with the Union's proposal written in Spanish and asked for proposed meeting dates. The parties' initial bargaining session on April 9 was preceded by a March 25 meeting to bargain over the effects of layoffs. The parties met for two more sessions on July 15 and 24 during which they discussed the Union's CBA proposal.

During the July 24 meeting, Carillo also requested a written counterproposal, but received only oral counterproposals from Silva Cofresí. The latter also reiterated the Company's need for an English version of the Union's initial CBA proposal as a "condition for the negotiations to continue." On August 6, Carrillo warned that the Union would file charges unless the Company dropped its demand that the Union's initial CBA proposal be translated into English and provided dates for the resumption of bargaining. Silva Cofresí responded the following day, reiterating the Company's position regarding the need for translation, and essentially retracted his previous comments by inviting Carillo "to continue with the negotiations as soon as possible." Rather than accept Silva Cofresí's offer to resume bargaining, Carillo filed a charge on September 2. As previously discussed, that charge lacked merit because the Company sought a reasonable accommodation by offering to pay for half the costs of translating the Union's initial CBA proposal.

There were no further developments until November 19, when Silva Cofresí again urged Carrillo to resume bargaining. Carrillo responded the next day. He attributed the delay to the filing of Board charges and rejected Silva Cofresí's request to resume bargaining unless the Company withdrew its request for an English translation of the Union's contract proposal.

On December 8, however, Carrillo had a change of heart. He wrote to Silva Cofresí and requested dates to resume bargaining. On December 10, Silva Cofresí and Carillo spoke by telephone. Silva Cofresí explained that he could not schedule bargaining during December because it was the Company's busy season. He told Carillo that he would schedule further bargaining dates once the Company got through high season. That did not happen.

After a few weeks elapsed, Carillo contacted Silva Cofresí around the end of December or beginning of January. However, Silva Cofresí explained that Ramon was going on vacation and he would provide dates when she returned. About a month elapsed without Silva Cofresí contacting Carillo. Carrillo followed up again on January 27, but this time Silva Cofresí took a different tack, stating that he was unable to meet and "would continue with the case pending before the NLRB." Carillo concluded with a request for bargaining dates so that negotiations could resume without being contingent upon the Union presenting its original proposal in English. Silva Cofresí replied the same day and suggested that there was a misunderstanding between them as to whether or not to delay negotiations while Board charges were pending. Carrillo, however, never agreed to freeze negotiations.

On February 5, Silva Cofresí reiterated the Company's willingness to pay 50 percent of the costs to translate the Union's proposals into English and invited the Union to resume negotiations on February 24. Carrillo accepted the offer to resume bargaining on February 8 and, for the first time, provided a basis for further bargaining over the translation issue. Although once again rejecting the Company's offer to share in the cost of translating the Union's initial contract offer, Carillo proposed to "continue exchanging proposals in English as well as the final result of the negotiations if an agreement is reached, and divide the translation cost in half."

On February 23, Silva Cofresí sent a text message to Carrillo requesting confirmation of bargaining the next day. Carillo provided the confirmation shortly thereafter, but Silva Cofresí texted him later that afternoon, stating that Ramon would be unavailable because Carillo had not provided prior confirmation. He urged Carillo to call to schedule new dates. Carrillo responded in a text message rejecting Silva Cofresí's excuse as a ploy. The next day, Silva Cofresí disputed Carrillo's assertion but offered to resume bargaining on March 22 or 23.

The Union's bargaining posture prior to December 2015 relieved the Company from culpability under the Act. On December 10, however, responsibility for the bargaining delays shifted to the Company when Silva Cofresí began a pattern of delay tactics by failing to offer any future bargaining dates based on his client's unavailability during the "high season." See *Diversified Bank Installations, Inc*., 324 NLRB 457, 467 (1997) (employer's failure to respond to union's requests for meetings were tantamount to a refusal to continue bargaining with the union during the term of the parties' contract).

When Carillo contacted him a few weeks later, Silva Cofresí failed again to provide dates for bargaining, declaring his client unavailable because she was on vacation. He assured Carillo that he would provide dates upon her return but another month elapsed. When Carillo contacted him in late January, Silva Cofresí shifted course, first refusing to meet because of the pending Board charges and then falsely representing that the parties agreed to freeze bargaining for that reason. See *Fred Meyer Stores, Inc*., 355 NLRB 179, 179 fn. 1 (2010) (conditioning bargaining on pending litigation constitutes bad faith bargaining); and *Richard Melow Electrical Contractors Corp*., 327 NLRB 1112, 1116 (1999) (employer failed to respond to request to meet which had been agreed to as part of a settlement of prior unfair labor practice charges).

On February 23, Silva Cofresí cancelled bargaining scheduled for the next day on a baseless excuse that Carillo had not confirmed more than 1 day in advance of the scheduled February 24 session. See *Calex Corp.,* 322 NLRB 977, 978 (1997).

Under the circumstances, the totality of the Company's conduct since December 10, 2015, caused delays in bargaining through March 2016, in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Company, UPS Supply Chain Solutions, Inc., is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Teamsters, Local 512, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All regular full-time and regular part-time warehouse employees who work at the Employer's facility in Caguas, Puerto Rico, excluding all other employees, guards, and supervisors as defined in the Act.

4. At all times since July 28, 2014, the Union has been, and continues to be the certified exclusive bargaining representative of the employee in the above-described unit.

5. The Company has failed and refused to meet and bargain with the Union, and, has by its overall conduct, failed and refused to bargain in good faith with the Union as the exclusive collective bargaining representative of the Unit in violation of Section 8(a) (5) and (1) of the Act by (1) on or about December 10, 2015, failing and refusing to schedule bargaining sessions until February 24, 2016; and (2) on February 23, 2016, canceling a bargaining session scheduled for February 24, 2016 and not agreeing to schedule another session until March 22 or 23, 2016.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. It is recommended the Company be ordered, upon request of the Union, to meet and bargain in good faith with the Union, and, if a collective-bargaining agreement is arrived at to reduce the same to writing and execute the agreement. The General Counsel also seeks a remedy affording the Union an additional year during which time its majority status cannot be questioned. Such relief is typically granted where the employer has, *during the year immediately following*

certification, failed and refused to bargain in good faith with a certified union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Under the circumstances, the Company failed and refused to bargain during a 4-month period. However, that unlawful conduct did not commence until 5 months after the expiration of the initial year following certification. Accordingly, there is no basis for an additional remedy extending the Union's initial certification year for purposes of withstanding any challenges to majority status.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, UPS Supply Chain Solutions, Inc., Caguas, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to meet at reasonable times and bargain in good faith with the Union as the exclusive collective-bargaining representative for its employees in the following appropriate bargaining unit:

> All regular full-time and regular part-time warehouse employees who work at the Employer's facility in Caguas, Puerto Rico, excluding all other employees, guards, and supervisors as defined in the Act.

(b) Canceling previously agreed upon bargaining sessions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 15 days of the Union's request, bargain with the Union at reasonable times and places in good faith as the exclusive bargaining representative of its employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions of employment until a full agreement or a bona fide impasse is reached, and if an understanding is reached, embody the understanding in a written agreement.

Dated: Washington, D.C. April 13, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to meet at reasonable times and bargain in good faith with the Union De Tronquistas De PR, Local 901, International Brotherhood of Teamsters (the Union) as your exclusive collective-bargaining representative in the following appropriate bargaining unit:

> All regular full-time and regular part-time warehouse employees who work at the Employer's facility in Caguas, Puerto Rico, excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT cancel previously agreed-upon bargaining sessions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 15 days of the Union's request, bargain at reasonable times and places and in good faith with the Union as your exclusive bargaining representative with respect to wages, hours, and other terms and conditions of employment until a full agreement or a bona fide impasse is reached, and if an understanding is reached, embody the understanding in a written agreement.

WE WILL meet with the Union on agreed upon and scheduled bargaining dates.

UPS SUPPLY CHAIN SOLUTIONS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-159257 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.